89-1694

NO.

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APR 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1989

STS D'APPOLONIA, LTD.,

Respondents

vs.

DURA-CORP, a corporation,

Petitioner

ON APPEAL TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 16, 1990

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A. QUESTION PRESENTED FOR REVIEW

Whether the District Court clearly erred in granting judgment in favor of the Plaintiff (Respondent) upon its Petition to Enforce Settlement Agreement, where the record clearly demonstrates that Plaintiff (Respondent) unjustifiably failed to fulfill its obligations under the parties' settlement agreement and was therefore in material breach thereof.

B. LIST OF PARTIES TO THE PROCEEDING

1. STS D'APPOLONIA, LTD. (Respondent)

2. DURA-CORP (Petitioner)

3. THOMAS R. EDDY (originally a Defendant in the District Court proceeding, in whose favor summary judgment was entered, and who consequently is not a party to this Petition).

C. TABLE OF AUTHORITIES

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E. REFERENCE TO LOWER COURT OPINIONS

1. Findings of Fact, and Conclusions of Law, United States District Court for the Western District of Pennsylvania, August 21, 1989. Appendix pages a-1 through a-6.

2. Judgment Order, United States District Court for the Western District of Pennsylvania, August 21, 1989. Appendix page a-7.

3. Judgment Order, United States Court of Appeals for the Third Circuit. Appendix pages a-9.

F. STATEMENT OF JURISDICTION

Petitioner is seeking a review of the Judgment Order issued by the United States Court of Appeals for the Third Circuit on February 23, 1990, which Order summarily affirmed the Judgment Order of the United

States District Court for the Western District of Pennsylvania issued on August District of Pennsylvania issued on August tion in the Third Circuit Court of Appeals was 28 U.S.C. §1291. The statutory pro- provision believed to confer jurisdiction on this Court to review the aforesaid Order of the Third Circuit of Appeals is 28 U.S.C. §1254(1).

G. STATEMENT OF THE CASE

The Petitioner, Dura-Corp, is a Pennsylvania corporation which manufactures, markets and distributes certain patented, concrete retaining wall systems. The Respondent, STS D'Appolonia, Ltd. ("STSD"), is a geotechnical engineering consulting firm with business offices in Monroeville, Pennsylvania. In July, 1986, STSD submitted a proposal to Dura-Corp to prepare an

engineering design manual, the purpose of which was, inter alia, to facilitate evaluation and approval of Dura-Corp's wall systems by various State Departments of Transportation.

On May 13, 1987, STSD filed suit in the U.S. District Court for the Western District of Pennsylvania against Dura-Corp, alleging that Dura-Corp had breached a contract between the two parties by failing to pay STSD for services rendered. Dura-Corp denied those allegations, claiming, inter alia, that the engineering design manual had not been completed nor tendered to Dura-Corp in satisfactory form, and that any professional services rendered by STSD were of no value to Dura-Corp.

The parties commenced a jury trial in the U.S. District Court on November 8, 1988. However, on November 9, 1988, prior to the conclusion of the trial, the parties entered into an oral settlement agreement which was

made a part of the record of the case and which thus concluded the trial. The oral settlement agreement provided that Dura-Corp would pay to STSD the principal sum of $80,000.00, plus interest at 10% per annum, payable in the following manner: $15,000.00 on or before November 30, 1988; $10,000.00 on or before the last day of each month from December of 1988 through May of 1989; and remaining interest on or before June 30, 1989. In consideration thereof, STSD was to complete the engineering design manual in "draft form" and to deliver it to Dura-Corp by the end of December, 1988. Dura-Corp was to have the opportunity to review the draft form of the manual, and to submit review comments to STSD. Those comments were then to be incorporated by STSD into the "final form" of the manual, which was to be delivered to Dura-Corp by the end of January, 1989. It was expressly contemplated that the review process would entail

a review by representativies of the Pennsylvania Department of Transportation.

Shortly after the November 9 settlement conference, counsel for the parties attempted to reduce the terms of the oral settlement agreement to writing. Dura-Corp found certain aspects of the proposed written agreement to be unacceptable, but nevertheless executed it subject to five (5) modifications which it communicated to counsel for STSD by letter dated November 30, 1989. One of these modifications concerned STSD's professional liability for the design manual, which STSD had inappropriately attempted to limit to $25,000, as opposed to $250,000 which had been agreed to at the November 9 settlement conference. The liability limitation issue could not be resolved amicably, and STSD petitioned the District Court to intercede. On January 25, 1989, pursuant to a conference with the Honorable Alan N. Bloch, the District Court

instructed STSD to adhere to the agreed upon $250,000 per incident limitation of liability.

For the next several weeks, the parties attempted to modify their written agreement to incorporate the $250,000 limitation of liability provision and to agree upon the language of a "disclaimer" which STSD had also insisted upon at the November 9 settlement conference. Believing that it would not receive the draft form of the design manual in time to submit it to PennDOT for review and comment prior to the Products Evaluation Committee meeting on February 6, Dura-Corp prepared a "substitute manual", consisting of various drawings and unrelated engineering data which it had accumulated in the past, and submitted it to PennDOT for review at the end of January. PennDOT found the substitute manual to be unacceptable and prepared a list of 19 items to be included in any re-submission by Dura-Corp. These 19

items were submitted by PennDOT to Dura-Corp in the form of a memorandum which Dura-Corp promptly transmitted to STSD.

On February 20, 1988, representatives of both parties met at the offices of STSD to review the 19-point memorandum and to revise the design manual to ensure that all 19 points were adequately covered therein. At that meeting, Dura-Corp delivered a check to STSD in the sum of $35,000.00 in partial payment for the design manual. As a result of the February 20 meeting, STSD made further revisions to the design manual which was then submitted to PennDOT for approval on February 24.

PennDOT responded to the February 24 submission by phone several days later, indicating that there were several deficiencies in the design manual. Representatives of STSD and Dura-Corp met again on March 2, 1989 for the purpose of further revising the design manual so that it would be approved

by PennDOT. At that meeting, Dura-Corp delivered a check to STSD in the sum of $10,000.00 as additional payment for the design manual. Pursuant to the March 2 meeting, STSD effectuated certain revisions to the manual and forwarded them to Dura-Corp for submission to PennDOT. Dura-Corp submitted these revisions to PennDOT on March 3. In a letter dated March 7, 1989, STSD informed Dura-Corp that it had reviewed all of the comments made by PennDOT and that the latest version of the design manual would receive PennDOT's approval. In that same letter STSD advised Dura-Corp that any further work on the design manual would be treated as extra work outside the scope of the parties' settlement agreement which would require the payment of additional compensation to STSD.

By letter dated March 22, 1989, PennDOT informed Dura-Corp that there were still two specific deficiencies in the design manual

which would have to be corrected before the manual would be approved. In a letter dated March 27, 1989, STSD advised Dura-Corp that it had no obligation to modify the design manual to meet with the approval of any governmental agency, and reiterated its demand for additional compensation (over and above the agreed upon $80,000.00) for any additional work.

H. ARGUMENT

The District Court stated, in its Findings of Fact and Conclusions of Law, that STSD performed all of the obligations required of it under the parties' settlement agreement. The Court specifically refers to the parties' settlement agreement as that reached orally on November 9, 1988, "as memorialized in the document dated November 30, 1988." In reaching its conclusion, the

District Court ignores the clear and overwhelming weight of the evidence that (1) the oral settlement agreement weas never properly reduced to writing; and (2) the oral settlement agreement was clearly modified during subsequent efforts by the parties to satisfy the requirements of PennDOT.

These efforts began when Dura-Corp prepared a so-called "substitute manual" which was submitted to PennDOT for review in late January, 1989. Although this substitute manual was rejected by PennDOT, it nevertheless prompted certain comments from the Department which were transmitted to Dura-Corp in the form of a 19-point memorandum. Dura-Corp promptly submitted the 19-point memorandum to STSD for review, and requested that the questions raised therein be properly answered in the "final form" of the design manual. STSD agreed to "address the revision to the satisfaction of

(PennDOT)." The parties then embarked on a mission to meet that objective. According to the testimony of Eugene Palmer, President of STSD:

> "...(T)here was discussion about the request for changes (to the manual), and, based on discussions back and forth between Dura-Corp, D'Appolonia and PennDOT, we arrived at mutually agreeable ways to handle them."

Pursuant thereto, Dura-Corp and STSD met on February 20, 1989 to review the 19-point memorandum. Following that meeting, STSD made certain revisions to the design manual which were forwarded to PennDOT on February 24. Further revisions were requested by PennDOT in late February. These requested revisions were addressed by STSD and forwarded to PennDOT on March 3 and March 8. At the conclusion of the March 2 meeting, the parties felt that all of PennDOT's concerns had been adequately addressed, and that the design manual would

meet with PennDOT approval. In a letter dated March 7, 1989, STSD transmitted to Dura-Corp the revised pages of the design manual which had been revised in accordance with the March 2 meeting. The letter reads, in part, as follows:

> "We have made the necessary revisions based on our review of the PaDOT comments Dura-Corp provided to us... We feel the enclosed revisions will meet with the approval of PaDOT... Transmittal of these pages constitutes fulfillment of our obligations..." (emphasis added).

The foregoing language clearly defines what both parties perceived to be the scope of STSD's obligations under the modified settlement agreement: the production of an engineering design manual which would be acceptable to PennDOT.

Unfortunately, the March 2 revisions still failed to meet with PennDOT approval.

By letter dated March 22, 1989, PennDOT representatives informed Dura-Corp of two particular areas of deficiency in the design manual. These deficiencies concerned (1) STSD's failure to use the proper technical specifications in all references to materials and construction; and (2) STSD's failure to submit a sketch depicting the proper requirements for steel reinforcing of the concrete units. Both of these matters had been previously raised in PennDOT's 19-point memorandum of February 14, 1989. Dura-Corp immediately transmitted the March 22 letter to STSD. Nevertheless, STSD stoutly refused to effectuate any further revisions to the design manual without additional compensation over and above the agreed upon price of $80,000.00. Under Pennsylvania law, a promissor is wholly discharged from his duty to perform when the other party renounces or repudiates its obligation to provide the agreed upon

exchange. City of Farrell v. H. Platt Co., 142 Pa. Super. 242, 15 A.2d 718 (1940). In its March 7, 1989 letter, STSD clearly acknowledged its contractual obligation to prepare a design manual which meet with the approval of PennDOT. The subsequent repudiation of that obligation clearly amounted to a material breach of promise which legally excused Dura-Corp from continuing to make payments to STSD under the terms of the parties' settlement agreement. Riley v. General Mills, Inc., 346 F.2d 68 (3rd Cir., 1965).

The District Court's Findings of Fact and Conclusions of Law inexplicably ignore the overwhelming weight of the evidence adduced at the evidentiary hearing. The Court's findings and conclusions can properly be characterized as a gross divergence from acceptable standards of jurisprudence and are clearly erroneous within the meaning of Federal Rule of Civil Procedure 52(a) and

applicable case law. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 105 S.Ct. 1504 (1985).

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

STS D'APPOLONIA, LTD., Plaintiff	)	
vs.	)	C.A. No. 87-1031
DURA-CORP, a corporation, Defendant	)	

FINDINGS OF FACT

1. Plaintiff STS D'Appolonia, Ltd., (STSD) is a corporation with its principal place of business in Illinois.

2. Defendant, Dura-Corp, is a Pennsylvania corporation with its principal place of business in Pennsylvania.

3. Dura-Corp manufactures, markets and distributes a concrete interlocking retaining wall system called Dura-Hold.

4. In July, 1986, STSD submitted a

proposal to Dura-Corp to complete a design manual to, inter alia, "facilitate evaluation and approval [of the Dura-Hold product] by [departments of transportation]." (Plaintiff's Exhibit 12).

5. The design manual was also intended to use by architects, engineers and draftsmen.

6. STSD did not guarantee that its manual would secure Pennsylvania Department of Transportation (PennDOT) approval of the Dura-Hold product.

7. Dura-Corp notified STSD to perform work on the design manual.

8. On May 13, 1987 STSD filed suite in this Court against Dura-Corp., alleging that Dura-Corp. had breached a contract between the two parties by failing to pay the plaintiff for services rendered.

9. Plaintiff and defendant began a jury trial before this court on November 8, 1988.

10. On November 9, 1988, the parties agreed upon a settlement, thus concluding the trial.

11. The settlement agreement, entered into by the parties as of November 30, 1988, provided that Dura-Corp. would pay to STSD a total of $80,000 plus interest. (Plaintiff's Exhibit 1; defendant's Exhibit C).

12. The payments were to be made in the following manner: $15,000 due November 30, 1988; $10,000 due December 30, 1988; $10,000 due March 30, 1989; $10,000 due April 30, 1989; $10,000 due May 30, 1989; and remaining interest due on June 30, 1989. (Plaintiff's Exhibit 1).

13. After receipt of the November and December payments, on or before December 30, 1988, STSD was to make a rough draft of the design manuls available to Dura-Corp.

14. Dura-Corp was to review and make comments on the rough draft within ten days.

15. STSD would then act upon the comments and submit the manual to Dura-Corp. in final form by January 30, 1989.

16. Dura-Corp. failed to make its November, December and January payments to STSD in a timely manner.

17. STSD completed the draft form of the manual by December 30, 1988, and could have produced it any time thereafter.

18. On February 20, 1989, STSD received $35,000, representing the November, December and January payments from Dura-Corp.

19. STSD produced the rough draft of the manual that same day.

20. Dura-Corp commented upon the manual in two phases: once even before STSD produced the rough draft and once after receiving the rough draft.

21. The comments made before the rough draft was produced were made by PennDOT in

response to a compilation of information sent to it by Dura-Corp.

22. STSD responded to all of the comments.

23. Dura-Corp paid an additional $10,000 to STSD on March 2, 1989.

24. By March 6 or March 7, 1989, after further revisions, STSD had transmitted a final design manual to Dura-Corp.

25. Dura-Corp has not paid the remaining $38,208.12[1] due to plaintiff pursuant to the parties' settlement agreement.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1332.

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[1] This amount includes additonal interest at the rate of one percent, upon which the parties agreed after Dura-Corp. failed to make its March and April payments (Plaintiff's Exhibit 9).

2. STSD has performed all of the obligations required of it pursuant to the parties' November 9, 1988 settlement agreement, as memorialized in the document dated November 30, 1988.

3. Dura-Corp has breached the settlement agreement by failing to pay STSD the remaining amounts due to it.

4. This Court will enforce the aprties' settlement agreement by entering judgment against Dura-Corp for the amount due to plaintiff under the parties' agreements, or $38,208.12.

Date: 8/21/89

S/Alan N. Bloch
United States District Judge

cc: Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

STS D'APPOLONIA, LTD.,	)	
	)	
Plaintiff	)	
	)	
vs.	)	C.A.No. 87-1021
	)	
DURA-CORP, a corporation,	)	
	)	
Defendant	)	

JUDGMENT ORDER

AND NOW, this 21st day of August, 1989, upon consideration of Plaintiff's Petition to Enforce Settlement Agreement filed inthe above-captioned matter on June 23, 1989, and upon further consideration of Defendant's Answer thereto.

IT IS HEREBY ORDERED that said Motion is GRANTED, and that judgment be and hereby

is entered in favor of plaintiff STS D'Appolonia, Ltd., and against Dura-Corp. in the amount of $38,208.12.

s/ Alan M. Bloch
United States District
Judge

cc: James R. Mall, Esquire
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Pittsburgh, PA 15222

Robert W. Koehler, Esquire
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Pittsburgh, PA 15219

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3641

STS D'APPOLONIA, LTD.,

v.

DURA-CORP, A CORPORATION
and
THOMAS R. EDDY,
DURA-CORP,
a Pennsylvania corporation

Appellant

Appeal from the United States District Court for the Western District of Pennsylvania
D.C. Civil Action No. 87-1031
(Honorable Alan M. Bloch)

Submitted February 6, 1990

Before : GREENBERG, SCIRICA and SEITZ,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is ADJUDGED AND ORDERED that the judgment of the district be and is hereby AFFIRMED.